

The decedent, James E. Tapp, Jr., filed this claim in 1995, alleging he had chronic lung disease (COPD) from welding galvanized metal on October 28, 1994. Judge Avery entered an Award in this claim on February 26, 1999, in which the Judge granted Mr. Tapp benefits for an occupational disease.

Respondent and its insurance fund appealed the February 26, 1999, Award to this Board. In an Order dated August 31, 1999, the Board held the parties stipulated Mr. Tapp sustained an accidental injury that arose out of and in the course of his employment and that stipulation was never withdrawn. The Board, therefore, ruled it was not proper for the Judge to compute Mr. Tapp's permanent disability benefits as if he had sustained an occupational disease. Accordingly, the Board both calculated and awarded Mr. Tapp permanent partial general disability benefits under K.S.A. 44-510e (Furse 1993) for an October 28, 1994, accidental injury rather than for an occupational disease. In short, in its August 31, 1999, decision, the Board reduced Mr. Tapp's permanent partial general disability from 100 percent to 11 percent. Mr. Tapp did not appeal that decision.

Mr. Tapp died in May 2003. Consequently, in September 2003 Ms. Tapp filed this request for death benefits. In the January 10, 2005, Award, Judge Avery found Mr. Tapp's "death most likely was a result, at least in part, of his work related injury."¹ But the Judge denied the request for death benefits as Mr. Tapp's death did not occur within five years of the date of accident as required by K.S.A. 44-520a (Furse 1993) based upon the decisions of the Kansas Supreme Court in *Brooks*² and *Forcade*.³

Ms. Tapp contends Judge Avery erred. In her brief filed with the Board, Ms. Tapp argues her husband died from an occupational disease. Ms. Tapp's brief concludes:

Based upon the forgoing argument a finding should be made that Mr. Tapp died as the result of a compensable occupational disease and the Order of Administrative Law Judge Avery should be reversed and the case remanded for a determination of all other issues.⁴

Ms. Tapp's brief implies that treating her husband's initial claim as one for an occupational disease rather than an accidental injury would entitle her to receive death benefits.

Conversely, respondent and its insurance fund contend the January 10, 2005, Award should be affirmed. They argue the Board's August 31, 1999, finding that Mr. Tapp sustained an accidental injury rather than an occupational disease was not appealed and, therefore, final. Consequently, they contend K.S.A. 44-520a(a) (Furse 1993) bars Ms.

¹ ALJ Award (Jan. 10, 2005) at 2.

² *Brooks v. Kansas Power & Light Co.*, 182 Kan. 177, 318 P.2d 1036 (1957).

³ *Forcade v. List & Clark Construction Co.*, 172 Kan. 119, 238 P.2d 549 (1951).

⁴ Ms. Tapp's Brief at 7 (filed Feb. 24, 2005).

Tapp's request for death benefits as Mr. Tapp died more than five years following his October 1994 accident. They also argue the evidence fails to establish that Mr. Tapp's death was related to his exposure to fumes at work.

The only issue before the Board on this appeal is whether K.S.A. 44-520a (Furse 1993) bars Ms. Tapp's request for death benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds and concludes the January 10, 2005, Award should be affirmed.

When Mr. Tapp litigated his claim against respondent and its insurance fund, the Board in its August 31, 1999, decision held the claim was for an accidental injury, as the parties had stipulated, instead of an occupational disease. The Board ruled Mr. Tapp was entitled to receive permanent disability benefits under K.S.A. 44-510e (Furse 1993) for an October 28, 1994, accident.

The Board's August 31, 1999, finding that Mr. Tapp was entitled to receive benefits for an accidental injury rather than an occupational disease became final when Mr. Tapp did not appeal the Board's decision. Accordingly, Ms. Tapp's request for death benefits is governed by the rules pertaining to an accidental injury. Consequently, Ms. Tapp's request for death benefits is barred by K.S.A. 44-520a (Furse 1993), which provides:

(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; **or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.**⁵ (Emphasis added.)

In *Forcade*,⁶ the Kansas Supreme Court interpreted G.S. 1949, 44-520a. That statute differed slightly from K.S.A. 44-520a (Furse 1993) as the former ended with the clause "or within eight months after the death of the injured employee if death results from the injury within three years after the date of the accident." The *Forcade* court held death

⁵ K.S.A. 44-520a (Furse 1993).

⁶ *Forcade*, 172 Kan. 119.

benefits were not due because the worker's death occurred more than three years after the date of accident. Likewise, the Kansas Supreme Court reached the same conclusion in *Brooks*.⁷

Based upon the Kansas Supreme Court decisions cited above, the Board concludes death benefits are not due when a worker's death occurs more than five years after his or her work-related accident. Accordingly, the January 10, 2005, Award should be affirmed.

The Board agrees that denying Ms. Tapp's request for benefits is a harsh result. The remedy, however, lies with the legislature.

The Board affirms the findings and conclusions in the January 10, 2005, Award.

AWARD

WHEREFORE, the Board affirms the January 10, 2005, Award entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of July, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁷ *Brooks*, 182 Kan. 177.

CONCURRING OPINION

In the 1951 *Forcade* decision, Justice Smith dissented, noting G.S. 1949, 44-520a did not limit the period for filing a claim for death benefits when the death occurred more than three years after an accident. According to Justice Smith, the *Forcade* majority disregarded the English language but, instead, strained to reach its interpretation.

There is no limitation as to time for filing the claim where death occurs more than three years after the accident. That may seem strange, but that is the way the statute is written. The English language permits no other interpretation.

. . . .

Where in that section [G.S. 1949, 44-535] do we find any provision fixing a time limit in which to commence proceedings for compensation? There is no such provision in that section nor do we find one anywhere until we read G.S. 1949, 44-520a. There we find no provision fixing the time within which death must take place after the accident to enable the defendants [*sic*] to recover compensation.

My point is, the construction put on the act by the majority opinion is a strained construction. To say the legislature obviously intended to set a specific time beyond which an employer would not be liable for death resulting from an accident is to give the legislature an intention which it failed to put into words.

The statute is ambiguous. I will not resolve that ambiguity in favor of the employer when to do so will deprive an orphan child of the injured workman the right to compensation a reasonable construction of the statute gives him.⁸

I agree with Justice Smith that the Kansas Supreme Court abandoned the language of the statute and strained to reach its interpretation of G.S. 1949, 44-520a. Nevertheless, we are bound by the Court's majority opinion. Therefore, K.S.A. 44-520a (Furse 1993) bars Ms. Tapp's request for benefits.

BOARD MEMBER

c: Seth G. Valerius, Attorney for Alexandra Tapp
Wade A. Dorothy, Attorney for Respondent and its Insurance Fund
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁸ *Forcade*, 172 Kan. at 124, 125.